88-783

Supreme Court, U.S.
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CLERK

CASE NO. _____

in the

Supreme Court

of the

United States of America

October Term, 1988

PETER DAVID VANDERCREEK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Second District Court of Appeals
for the State of Florida

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Questions Presented

1. Whether any of the so-called automobile exceptions permit a warrantless search of the interior of petitioner's automobile for objects not externally visible where the locked automobile was lawfully parked on petitioner's home property immediately adjacent to his residence.

2. Whether state prosecutor's improper jury arguments falsely accusing petitioner's counsel of subordination of perjury *e.g.* "manufactured, contrived and fabricated defenses put together by experienced criminal defense lawyers" violated petitioner's due process right to fair trial.

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PETER DAVID VANDERCREEK,
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STATE OF FLORIDA,
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PETITION FOR WRIT OF CERTIORARI
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Opinions Below

The Decision of the Second District Court of Appeal for the State of Florida, per curiam affirmed, and the order denying rehearing, set out in the Appendix, *infra*, are not reported.

Jurisdiction

The decision of the Florida Second District Court of Appeal was entered on July 8, 1988. The timely Petition for Rehearing was denied on September 7, 1988. The District Court of Appeal is the court of last resort because no further direct review may be obtained in the Supreme Court of Florida. This Petition for Certiorari was timely filed pursuant to Supreme Court Rules 20.1 and 28.2. Jurisdiction of this Court exists under 28 USC § 1257(3).

United States Constitutional Provisions

Amendment XIV Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of Case

Petitioner was tried and convicted of second degree murder arising from a shooting incident in his yard. (R. 1334, 1484-86, 1489). On appeal to the Florida Second District Court the defendant argued: 1) acquittal should have been directed because self defense was unrebutted by the State 2) illegal search and seizure of the evidence (weapon) found in his automobile and 3) improper jury arguments. Without opinion, the District Court entered a judgement of per curiam affirmed.

After the shooting, petitioner telephoned the police from his home for an ambulance. (R. 213, 454). The police arrived forthwith and arrested the petitioner as he came out of his residence. (R. 80-88). Shortly after his arrest, the petitioner was removed from the scene. (R. 979). The decedent's body was located adjacent to the residence's exterior wall and in

close proximity to petitioner's parked car. (R. 90). The car was on private property that was included in the lease of petitioner's home for parking. (R. 433, 1057-1059). The car was within a couple of feet of the residence. (R. 937). The police searched the outside area and were unable to find any weapon. (R. 97). The police questioned petitioner's sister who shared the two bedroom duplex and sealed the petitioner's bedroom and posted a policewoman in the home until a search warrant could be obtained. (R. 219). The petitioner's car was locked and the police looked in, but were unable to see any weapon in the car. (R. 180, 996-100). Several hours after the petitioner's arrest and removal from the scene, the police had the car towed to the pound. (R. 1000, 1017). Later that morning a search warrant was prepared for submission to the court, but the police, acting on instruction from the state attorney's office, proceeded to search the car without obtaining the warrant. (R. 920, 1018-1021). The weapon was found by the police in the car and immediately thereafter the police were removed from the petitioner's residence without any search of his bedroom. (R. 1035-38).

The petitioner filed a timely motion to suppress the evidence seized on the warrantless search of his automobile. (R. 1147-49). Following the evidentiary hearing, (R. 920-1116), the state argued the automobile exception cases and because there were blood specs on the exterior of the automobile, as well as on the duplex wall, that they could search under the plain view doctrine the interior of the car for the weapon they had been unable to see. The trial court denied the motion. (R. 1216-1217). The petitioner renewed the objection to the evidence at trial, (R. 246, 251, 256), on the Motion for new trial, (R. 260-267), and as error on the appeal to the District Court of Appeal. At trial the petitioner testified that he shot the decedent in self defense. (R. 449-453). In the jury argument the prosecutor went far beyond attacks on the petitioner. The prosecutor argument charged that the petitioner's attorneys had subordinated perjury and had fabricated the self-defense issue and the expenses and the

prosecutor's personal knowledge that he knew it:

> "That system of justice...can only work when people such as yourselves look beyond the manufactured contrived and fabricated defenses put together by experienced criminal defense lawyers."
>
> "I'm here to tell you that the defense of self-defense in this case is manufactured and contrived and the reason that I tell you that is because it's totally and completely, totally and completely dependent upon the testimony of Peter David VanDercreek, totally." (R. 635)

The prosecutor went on to argue that the failure to call doctors who treated petitioner for motorcycle injuries was a part of the defense attorney's subordination conspiracy:

> "...the injuries that I recall Mr. VanDercreek saying that he had, and a broken back, and after asked him several times, he acknowledged that the most permanent of those injuries was the broken back that he described and he told you that the source of the information concerning the nature of his injuries was his doctors." (R. 636)
>
> * * *
>
> "The defense knowingly, knowing well that they were going to need to explain to you the conduct of Peter David VanDercreek on November 24, 1985, they chose not to present to you from a totally unbiased, from a completely knowledgeable person the medical testimony that would tell you exactly what Peter VanDercreek wanted you to know. They didn't do it. They chose to establish that, to raise, to create, to manufacture self-defense." (Emphasis added) (R. 637-638)

After a further repetition of this theme in the prosecutor's argument and an acknowledged false statement that the prosecutor could not call the doctors because he did not know who they were, defense counsel objected and moved for a mistrial.[1]

Immediately following the jury verdict of second degree murder, the trial Court set a special hearing on the jury argument issue. The trial court ruled:

> The Court specifically finds that Mr. Castillo's remark, "Look beyond the manufactured, contrived andfabricated defense put together by experienced criminal defense lawyers," is improper and unethical and in violation of the Canons.

(R. 777-778). The judge, however, denied a new trial. (R. 783, 850-851, 1337).

The trial court considered the jury argument under the fundamental error standard because the objection and motion for mistrial was not made at the first instance of improper argument but only after it had been repeated. On appeal petition cited authority that the motion for mistrial made prior to completion of argument fully preserved the error. *Perdomo v. State*, 439 So.2d 314 (Fla. 3d DCA 1983). Even retrial under thefundamental error standard, the argument deprived the petition of a constitutionally protected fair trial. The trial Court ruled that the argument of subornation of perjury was improper, but not fundamental error. (R. 777-778). An appeal was perfected and the District Court of Appeal affirmed per curium without opinion. The timely petition for rehearing was denied.

[1]See Appendix *infra*.

FLORIDA'S EXTENSION OF THE AUTOMOBILE EXCEPTION TO A LOCKED, UNOCCUPIED CAR, PARKED AT THE HOME OF A SUSPECT ALREADY TAKEN INTO CUSTODY, DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN COOLIDGE

This case presents a question of fundamental importance of whether it is legally possible to have a constitutionally protected expectation of privacy extending to the non-visible contents of one's locked automobile parked on private property at one's own home. This Court's plurality decision in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), has spawned contradictory interpretations and numerous exceptions. Considering the great numbers of citizens who own automobiles and who park them on their property immediately adjacent to their homes, it is appropriate to grant certiorari.

This Court, in *California v. Ciraolo*, 476 U.S. 207 (1986), recently reiterated the general principle:

> The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347 (Harlan, J., concurring). *Katz* posits a two-part inquiry: First, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?

Id. at 211. (Some case citations omitted). Citizens have a subjective expectation of privacy in the contents of their locked cars that could not be seen from the exterior, and there is certainly an objective basis for this expectation of privacy. A person breaking into such car, lawfully parked on the owner's property next to his residence, could not justify such illegal entry and warrantless search on the basis of what such person

discovered.

The trial Court Order denying the motions to suppress ruled that the search was justifiable under the plain view and automobile exceptions. The trial court held:

Since the vehicle was in plain view and the blood on the vehicle in plain view after the officers came upon the premises under exigent circumstances, the seizure and search of the vehicle was justifiable without a warrant and the fact that the officers considered obtaining a search warrant before conducting the search is of no relevance.

R. 12-16 to 12-17

Defense had urged suppression because the automobile was parked and locked within the curtilage of defendant's residence and did not fall within any of the automobile exception cases. Nor was the evidence seized from the car visible through the windows of the car.

The trial court dismissed the evidence that the prosecutor considered obtaining a search warrant, had time to get a search warrant, but chose to proceed without a search warrant as being of no relevance. This is, however, the crux of the matter. Warrantless searches are presumptively invalid and are prohibited except in a "'few specifically established and well-delineated exceptions.'" *Scheckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), *quoting Katz v. United States*, 389 U.S. 347, 357 (1967). The automobile exception is based on the theory that when a vehicle is stopped on the open highway, obtaining a warrant is impractical "because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll v. United States*, 267 U.S. 132, 153 (1925). In *Chimel v. California*, 395 U.S. 752 (1969), this principle was reaffirmed by this Court, stating:

Our holding today is of course entirely consistent with

> the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants 'where it is not practicable to secure a warrant.'

Id. at 764. (Emphasis added). Similarly, in *Chambers v. Maroney*, 399 U.S. 42 (1970), this Court restated the rationale of the automobile exception:

> [A] search warrant is unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant is obtained.

Id. at 51. (Emphasis added)

This Court, however, has never extended the vehicle exception to a general pronouncement that a warrant is never required to search an automobile under any circumstances. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. 443, 462 (1971). This unwarranted extension of the automobile exception by the State of Florida is contradictory to the rationale of *Coolidge*. There, a suspect's car was seized from where it was parked, unoccupied, at his home, while he was in custody and had been taken to jail, and later searched at the police station. *Id.* at 462. In refusing to extend the automobile exception to such a situation this Court reasoned:

> [T]here is nothing in this case to invoke the meaning and purpose of the rule of *Carroll v. United States* -- no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard

> the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where "it is not practicable to secure a warrant," . . . and the "automobile exception," despite its label, is simply irrelevant.

Id. This Court also reasoned:

> But if *Carroll v. United States*, 267 U.S. 132, permits a warrantless search of an unoccupied vehicle, on private property and beyond the scope of a valid search incident to arrest, then is would permit as well a warrantless search of a suitcase or a box. We have found no case which suggests such an extension of *Carroll*.

Id.

Florida seeks to make exactly the extension which this Court refused to make and condemned seventeen years ago. In this case, the Defendant was in custody after he had been arrested upon exiting his home. The police had secured the area encompassing both the home and the side yard where the locked vehicle was parked. The car was unoccupied. A police guard prevented any entry into the Defendant's room or vehicle. The police prepared the documents necessary to obtain a proper warrant. Since the courts were open and immediately available at the time of the search, the police upon a showing of good cause would have obtained the warrant. The state's argument that a warrant was unnecessary because probable cause existed, would nullify completely the need to ever seek a warrant in the first instance, as this Court observed in *Coolidge*.

In spite of this, they consciously choose not to bother. This is not an exigent search of the type established by this Court in the automobile exception cases. It was practical, at no risk, for the police to obtain a warrant, but instead, they

choose to deliberately ignore the Fourth Amendment protections guaranteed to the Defendant by the Constitution by searching his property without a warrant. Such a calculated disregarded for proper procedures is precisely what the exclusionary rule was created to deter.

If *Coolidge* is to be overturned, then that action must be taken by this Court, not the State of Florida. If a warrant is never required to search an automobile when an officer has probable cause, then this Court should announce that in no uncertain terms so that the police could make such decisions without unnecessary confusion. If, however, *Coolidge* remains the law of the land, then this Court should grant certiorari in this case and clarify the automobile exception so that police can ensure correct constitutional protections are implemented and ensured.

> When a vehicle is being used on the highways, or if it is readily capable of such use and it found stationary in a place not regularly used for residential purposes - temporary or otherwise - the two justifications for the vehicle exception come into play.

California v. Carney, 105 S.Ct. 2066 (1985). (Emphasis added).

ALLOWING GROSSLY IMPROPER JURY ARGUMENT FALSELY ACCUSING THE DEFENSE COUNSEL OF SUBORNATION OF PERJURY IS CONTRARY TO THE RATIONALE OF THE DECISIONS OF THIS COURT AND OTHER FEDERAL APPELLATE COURTS

Rule 17.1(b) of the Supreme Court Rules indicates that certiorari will be considered "[w]hen a state court of last resort has decided a federal question in a way in conflict with the decision of . . . a federal court of appeals." The per curium affirmed decision rendered by the Court of Appeals for the Second District of Florida conflicts with the federal

constitutional principles set forth in *Berger v. United States*, 295 U.S. 78 (1934) and *Bruno v. Rushen*, 721 F.2d 1193 (9th Cir. 1983), *cert. denied, McCarthy v. Bruno*, 469 U.S. 920 (1984).

While the standard used to determine whether the improper argument warrants reversal, as set forth in *Darden v. Wainwright*, 477 U.S. 168 (1986), allows for a fair degree of latitude in attacks on the defendant himself before the impropriety becomes impermissible [2], neither this Court nor any federal court of appeals has ever extended such latitude to direct attacks by the prosecution on the defense counsel. To force a defendant to be represented by a lawyer who, in the eyes of the jury, has been made a defendant himself, and whose very veracity and integrity have been unjustly attacked, is worse than a total denial of the right to counsel. Petitioner's counsel were portrayed to the jury as lying suborners of perjury who were consciously trying to deceive the jury and thwart justice. Such a picture is repugnant to all right thinking people and the animosity aroused by such repugnance could not help but to poison the minds of the jurors so as to render their decision fundamentally unfair. Only by granting certiorari can this court resolve the current conflict between the law of Florida and federal constitutional precedents and to set forth meaningful guidelines as to the limits of prosecutorial conduct regarding comments on opposing counsel.

The Prosecutor's extremely prejudicial accusations against the defense counsel during final argument completely destroyed any credibility the defense counsel had before the jury. This deprived the Petitioner of a fair trial and his right to due process; therefore, the Petitioner is entitled to a new trial. *See, e.g., Donelly v. DeChristoforo*, 416 U.S. 637 (1974); *Darden*

[2] In *Darden*, the prosecutor repeatedly referred to the defendant as an animal, stated he should never be let out of his cell except on a leash and told the jury that a death sentence was the only way to avoid a similar crime in the future. There the Court, on a Habeas corpus review, found that the comments had not so infected the trial as to make the resulting conviction unfair and a denial of due process.

v. Wainwright, 477 U.S. 168 (1986); *United States v. Fakhoury*, 819 F.2d 1415, 1422 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 749 (1988).

In closing argument, while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1934). Here the prosecutor crossed that line, landing his blows below the belt, when he claimed he knew the defense counsel had manufactured, contrived and fabricated the defense of self-defense to the charge of murder, as follows:

> Our system of justice...can only work when people such as yourselves look beyond the manufactured, contrived and fabricated defenses put together by experienced criminal defense lawyers. You have to work at it. You can't just listen passively as you sit there. You have to examine, dissect, compare, evaluate very carefully everything that you hear and then use those same tools with respect to what you don't hear.
>
> I'm here to tell you that the defense of self-defense in this case is manufactured and contrived and the reason that I tell you that is because it's totally and completely, totally and completely dependent upon the testimony of Peter David Vandercreek, totally.

(R. 635.) (Emphasis added) [3]

[3] The Prosecutor continued this line of inflammatory and prejudicial argument when he impermissibly commented upon uncalled witnesses, the Doctors who had treated the Defendant for previous injuries. Some of these injuries were caused by the alleged victim while others were a result of an earlier traffic accident. Despite the fact that Florida does not recognize a Doctor/Patient privilege and these witnesses were known to the prosecution before trial, the prosecution did not call the doctors and alleged the defense

One of the basic principles of closing argument is that an attorney may not explicitly or implicitly claim personal knowledge of facts outside the record which support his position. *Berger*, 295 U.S. at 86-89. It is also established that in closing arguments, lawyers must refrain from inflammatory rhetoric which appeals to the passions and prejudices of the jurors, *Id.*, and may not misrepresent the evidence on a material fact or argue prejudicial inferences not based on the record. *United States v. Vargas*, 583 F.2d 380, 384-386 (7th Cir. 1978); American Bar Association Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Sec. 5.8 (1974). *See also, United States v. Fearns*, 501 F.2d 486 (7th Cir. 1974) and *United States v. Davis*, 532 F.2d 22 (7th Cir. 1976). Here, the Prosecutor violated each and every one of these precepts in his argument. He impermissibly asserted his personal knowledge that he knew the claim of self-defense was manufactured and contrived. (R. 635). He improperly inflamed the jury's passions and prejudices by alleging the defense counsel had created this story, manufactured it, contrived it, in order to deceive them, (R. 635), and he misrepresented facts known to him, but not on the record, by arguing prejudicial inferences based upon the defense's failure to call supporting witnesses. (R. 637-638). Consideration of this case by this Court is warranted to protect the integrity of the criminal trial system and assure due process.

This is not a case where the Prosecution merely commented upon the credibility of the defendant's testimony and compared it to the other evidence presented in the case. It is established that a prosecutor commits reversible error if he accuses defense counsel of improper or unethical conduct without specific supporting evidence in the record. *Bruno v. Rushen*, 721 F.2d 1193 (9th Cir. 1983), *cert. denied, McCarthy v. Bruno*, 469 U.S. 920 (1984). In *Bruno*, the Ninth Circuit

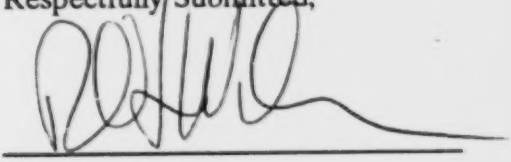
failed to call them in order to "to raise, to create, to manufacture self-defense." (R. 637-638).

reversed a murder conviction because in closing argument the prosecutor accused defense counsel of fabricating evidence, and, without any basis in the record, accused defense counsel of being "retained solely to lie and distort the facts and camouflage the truth . . . " 721 F.2d at 1194-1195. Thus, *Bruno* is identical to the case at hand in that here the prosecutor accused the defense counsel of manufacturing, creating and contriving the testimony of the Petitioner and the entire theory of the defense out of thin air. Such unfounded accusations, occurring immediately before the defense counsel was to address the jury, clearly prejudiced the Petitioner. This Court, by granting Certiorari, can insure that the judicial process of determining guilt is not tainted by improper attacks on the integrity of counsel.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,



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APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PETER DAVID VANDERCREEK,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 87-1251
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

Opinion filed July 8, 1988

Appeal from the Circuit Court
for Hillsborough County;
M. William Graybill, Judge.

Richard G. Pippinger of
Pippinger-Tropp, P.A., Tampa,
and Raymond O. Gross of Gross
and Kwall, P.A., Clearwater,
for Appellant.

Robert Butterworth, Attorney
General, Tallahassee, and Gary
O. Welch, Assistant Attorney
General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

DANAHY, C.J. and THREADGILL and PARKER, JJ., Concur.

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

SEPTEMBER 7, 1988

PETER DAVID VANDERCREEK,	)	
	)	
Appellant,	)	
v.	)	Case No.
	)	87-1251
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

Counsel for appellant having filed a motion for rehearing in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied.

A TRUE COPY
ATTEST:

[signature not reproduced]

WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

c: Richard Pippinger, Esquire
Raymond O. Gross, Esquire
Attorney General

THE COURT: "You did, so let's get to the point."

* * *

MR. PIPPINGER: "Starting from the very beginning of final argument, Mr. Castillo starts off by saying, 'I know it's fabricated, you know it's fabricated, they know it's fabricated.' using what he knows instead of evidence in this case, and then having the audacity to tell that jury what I believe and what Mr. Gross believes and that is grossly improper, Your Honor, grossly improper.

Number two, my understanding of the rules of final argument, and this is perhaps somewhat of a lesser magnitude, is what when records are available equally to both sides, no inference can be drawn if they are not produced by either side and the State has subpoena power just precisely like we do and the State deposed Mr. VanDercreek's father and Mr. Vandercreek's mother and Mr. Vandercreek's sister, and to suggest that they don't know, don't have any way of knowing somehow suggesting that this is a secret, is absolutely incredulous.

They also subpoenaed University Community Hospital records relating to at least another event, but I believe all records, Your Honor.

Finally, the third area that concerns me is for Mr. Castillo to suggest to that jury that he was out there five to ten minutes because of Holly's testimony, which was introduced by Saladino, so to speak, for impeachment, not substantive purposes, when Mr. Castillo has the tapes of Mr. Jagentan and the other reporting witness who reported gunshots almost simultaneously with Mr. Vandercreek. He knows,

first, that it is not accurate, and second, it was introduced only for impeachment purposes.

Your Honor, one's an incident, twice is a coincidence, and three or four times is enough. Mr. Castillo, in my humble estimation, is encouraging a mistrial. Mr. Castillo has wholly failed to prove his case and he knows it. Mr. Castillo --" R. 661-663.

* * *

THE COURT: "Are you making a Motion for Mistrial?"

MR. PIPPINGER: "Yes, Your Honor, I am."

THE COURT: "State the specific grounds."

MR. PIPPINGER: "Grossly and totally improper final argument by the State of Florida in three to four areas that I have mentioned.

The fourth area being the going back after seeing the medical records, going back and again saying they didn't have access to them. That is two aspects. The name and making for grossly improper final argument. I ask that the mistrial be attributable to the State and not the Defense."

THE COURT: "How can you do that?"

MR. PIPPINGER: "Because they have caused it intentionally in my judgement, prosecutorial misconduct." p. 664

THE COURT: "You are now accusing the State of prosecutorial misconduct?"

MR. PIPPINGER: "Yes, I am. I think the record speaks for itself, Your Honor."

THE COURT: "Why did you lay and wait? Why the second Mr. Castillo mentioned about the doctors not being called, wasn't there an objection made right at the very first time he mentioned it?"

* * *

MR. PIPPINGER: Your Honor, I hesitate, I hesitate to interrupt final argument because that jury of twelve people, every time, you know, thinks you're trying to hide something from them.

* * *

THE COURT: Why did you wait? You ultimately objected.

MR. PIPPINGER: I had no choice when we got to four times, Your Honor. What am I supposed to do, object?...

* * *

THE COURT: "Now, lawyers sometimes get carried away and instead of saying the evidence will show that self-defense is a manufactured defense, a lawyer may use, I suggest it's manufactured, they know it. I don't find deliberate prosecutorial misconduct.

I do find that hindsight batting a thousand, the State would have been well advised not to use such language or such suggestion.

Your Motion for a Mistrial is denied." R. 661-666.

Supreme Court, U.S.
FILED
DEC 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

IN THE
UNITED STATES SUPREME COURT
October Term 1988

Case No. 88-783

PETER DAVID VANDERCREEK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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COUNSEL FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether any of the so-called automobile exceptions permit a warrantless search of the interior of petitioner's automobile for objects not externally visible where the locked automobile was lawfully parked on petitioner's home property immediately adjacent to his residence.

2. Whether state prosecutor's improper jury arguments falsely accusing petitioner's counsel of subordination [SIC] of perjury e.g. "manufactured, contrived and fabricated defenses put together by experienced criminal defense lawyers" violated petitioner's due process right to fair trial.

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The decision of the Florida Second District Court of Appeal is reported as Vandercreek v. State, 531 So.2d 719 (Fla. 2d DCA 1988).

JURISDICTION

The per curiam affirmance of the petitioner's judgment precluded the petitioner from obtaining any possible jurisdiction in the Florida Supreme Court. Jenkins v. State, 385 So.2d 1356 at 1359 (Fla. 1980). As such, the Florida Second District Court of Appeal is the court of last resort for direct proceeding in Florida in the instant case. This Court may entertain the constitutional issues presented pursuant to 28 U.S.C. section 1257(3).

STATEMENT OF THE CASE

The petitioner was charged with first degree murder of Dion Grant. (R 1125-1126) The evidence adduced at trial overwhelmingly proved that the petitioner shot and killed Dion Grant, and as such, the petitioner's sole tactic at trial was to establish the defense of justifiable use of force (self-defense).

The state presented evidence in its case in chief that the petitioner and Dion Grant were homosexual lovers (R 141-142), that the shooting of Dion Grant by the petitioner had been preceded by Grant's kissing and dancing with Carlos Gonzalez (R 52-53), the petitioner's apparent irritation with Grant's actions (R 54), that there was an argument between the petitioner and Dion Grant during the ride to the petitioner's residence which resulted in the petitioner being cited for careless driving (R 74), and the shooting

of Dion Grant a few minutes after the conclusion of the traffic stop outside the petitioner's residence (R 79-80). Police officer Myers, the first officer to respond to the police radio broadcast and the officer who issued the preceding traffic citation to the petitioner, testified that upon arriving at the scene the petitioner exited his residence and stated "he is dead" (R 88). The petitioner's clothes were not torn, his hair was not messed and there were no visible signs of scratches, abrasions or bruises at this time (R 90). The petitioner was immediately arrested and searched for a weapon (R 972). Officer Myers then pushed the residence door open and observed Holly Vandercreek, the petitioner's sister, in the residence (R 91). Myers was informed by Holly Vandercreek that the petitioner entered the residence after the shooting without a gun (R 997). Myers attempted to check the

petitioner's vehicle for the murder weapon but the doors were locked (R 980). A search of the surrounding area failed to produce the weapon (R 97, 993).

The crime scene consisted of a parking lot which served numerous duplex apartment units (R 1193). The victim's body was found in the area between the parking lot and the petitioner's duplex unit (R 1195). The victim was without his shoes, there were blood splatterings on the petitioner's car, there were six bullet casings found around the car and the victim had been shot four times (R 293, 990, 992, 1006). As a result of the above evidence, the investigating officer believed that both the gun and the victim's shoes were in the petitioner's car (R 998, 1008). The petitioner's car was impounded and a search warrant was sought by the police. However, the car was subsequently searched without obtaining a warrant after the police were

apprised by a representative of Office of the State Attorney that a warrant was unnecessary (R 1019). This search produced both the murder weapon and the victim's shoes (R 1035-1038).

In response to the anticipated defense of justifiable use of deadly force, the state presented evidence that the victim had been shot two times in the front, two times in the back and that all four shots were probably fatal (R 371-372). It was further stipulated that the victim was 5'6" tall and weighed 123 pounds at the time of death (R 386, 391-392).

The petitioner testified that he had a motorcycle accident in Tampa on June 2, 1982 (R 404). Prior to this accident, the petitioner and Dion Grant had become lovers and had lived together (R 414-416). After living together for 3-4 months, the petitioner and Grant became involved in a fight during which the police were called

(R 418-419). Grant moved out after the fight and returned a month later (R 419-420). After living together for another four month period, Grant left because of another fight (R 420-421). Subsequently, the petitioner received a back injury as a result of his motorcycle accident and moved to Tallahassee for 14 months for the purpose of receiving rehabilitation treatment (R 405-406). The petitioner returned to Tampa in September of 1983 and began living with Grant again (R 406, 422-423). The petitioner informed Grant that there could not be any further fights because of the petitioner's back injury (R 424). In March of 1984, the petitioner and Grant became involved in another fight which required a police response (R 425-426). Grant moved away because of this fight (R 424). Grant and the petitioner resumed their relationship that same month. However, they never lived together again (R 427, 429).

In July of 1985, the petitioner went to visit Grant at Grant's residence. After staying there for a few hours, the petitioner became angry because he believed that Tommy Gay had stolen his money (R 474). After Grant interceded on the petitioner's behalf, the petitioner went outside and demanded his money (R 476). Thereafter, petitioner fired shots into the air and at the house (R 476-477).

The petitioner testified that on the night of the shooting the petitioner and Grant were returning from a bar when Grant decided that he wanted the petitioner to buy him a hamburger (R 440-442). When the petitioner refused to buy Grant a hamburger, Grant grabbed the steering wheel. This caused damage to the petitioner's car and resulted in the petitioner receiving a traffic ticket (R 446-447). After driving further, Grant was told by petitioner to get out of the car and walk home (R 448). When Grant

refused to exit the car, the petitioner told Grant that he could walk home from the petitioner's house. Upon arriving at the petitioner's residence, Grant began approaching the petitioner while saying he was going to get the petitioner (R 452). The petitioner fired two warning shots and then shot Grant because he was afraid that Grant would take the gun and use it on the petitioner (R 453).

The prosecutor initiated his closing argument by stating: (1) that the jury must "look beyond the manufactured, contrived and fabricated defenses put together by experienced criminal defense lawyers" and (2) I'm here to tell you that the defense of self-defense in this case is manufactured and contrived and the reason that I tell you this is because it's totally and completely, totally and completely dependent upon the testimony of Peter David Vandercreek, totally" (R 634). The prosecutor went on to argue motive,

the crime scene facts and past manifestations of superior strength over Grant by petitioner (R 635-636). Thereafter, the prosecution argued that petitioner chose not to present the testimony of the medical doctor who had treated the petitioner for his back injury and that the petitioner chose to rely on his own testimony "to raise, to create, to manufacture self-defense" (R 637-638). The prosecutor further submitted that the petitioner's actions were manifestations of hostility rather than fear and analogized the acts of petitioner in taking Grant's life to previous uses of the gun by petitioner in situations of anger and frustration (R 641-643). As the prosecutor announced that he was coming to the conclusion of his argument the petitioner objected for the first time (R 661). At this time, the trial court noted that the objection occurred 48 minutes after argument had been initiated (R 661).

When the trial court asked the petitioner's counsel for specificity as to his grounds for mistrial, defense counsel delineated his reasons as follows: (1) it was improper for the prosecutor to tell the jury what defense counsel believed, (2) it was improper to argue an inference from the failure to present medical records since these matters were available to both sides, (3) it was improper to argue impeachment evidence for substantive purposes and (4) it was improper for the state to argue that they did have access to the petitioner's medical records (R 661-664). Thereafter, the petitioner's counsel categorized the above as manifesting prosecutorial misconduct warranting a mistrial (R 664). After questioning counsel why he waited so long to object, the trial court stated that the prosecutor's argument suggesting that the evidence was manufactured was ill-advised. However, the trial court denied the motion

for mistrial (R 666). Thereafter, the trial court gave the petitioner's attorneys the option of a curative instruction or the right to refute the prosecutor's statements in final summation (R 671-673). Petitioner's counsel chose to refute the prosecutor's allegations in summation (R 673).

In closing argument, the petitioner's counsel made specific reference to the prosecutor's allegations that the claim of self-defense was a contrived story and argued what the prosecutor said was not evidence and that such statements should not have been made (R 681). Petitioner's counsel went on to argue that defense counsel had confidence in the petitioner's version of the events (R 681).

The petitioner filed a Motion for New Trial and Renewed Motion for Judgment of Acquittal in which the petitioner again raised his claim of improper prosecutorial argument (R 1335-1336). During the

hearing on this motion, the trial court expressed the opinion that even if the objection by petitioner was sufficient to preserve the issue, a harsh curative instruction highly prejudicial to the state would have been sufficient (R 848); but that counsel chose to handle it in final rebuttal argument (R 847). The trial court also expressed the opinion that defense counsel's rebuttal argument offset the improper statements by the prosecutor (R 850). Thereafter, the trial court summarily denied the Motion for New Trial without an opinion (R 850-851, 1337).

REASONS FOR DENYING THE WRIT

I.

FLORIDA'S APPLICATION OF THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT IS CORRECT UNDER THIS COURT'S DECISION IN TEXAS V. WHITE.

The petitioner here argues that the decision of the Florida Second District Court of Appeal is in conflict with this Court's decision in Collidge v. New Hampshire, 403 U.S. 443 (1971). While some of the facts of this case are similar to ones in Collidge, the variation in facts makes the holding in Collidge inapplicable to this situation. In both Collidge and the instant case, the automobile was parked outside the residence, the car was impounded and taken to the police station, there was sufficient time to obtain a search warrant and the car was searched without a warrant at the police station. However, Collidge is distinguishable from the instant case for several reasons.

First, in Collidge, law enforcement had sufficient time to prepare for a deliberate police investigative search. Secondly, the Collidge decision specifically turned on the fact that there were no exigent circumstances which obviated the warrant requirement. In Collidge this Court specifically noted that there were no weapons or other facts involved which would otherwise make obtaining a warrant impractical. Collidge, 403 U.S. at 462.

Sub judice, law enforcement was making an immediate emergency response to a homicide crime scene and the vehicle was evidence of the crime in open view. Additionally, law enforcement was unable to find the handgun that was unquestionably within the immediate area, and they firmly believed that the weapon was in the petitioner's car.

Since Collidge, this Court has made it clear that a motor vehicle may be

searched absent exigent circumstances when there is probable cause to search the vehicle. Texas v. White, 423 U.S. 67 (1975). Particularly, this Court has rejected the argument that a motorhome has all the expectations of privacy of a residence when "the vehicle is so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle". California v. Carney, 471 U.S. 386 at 393 (1985).

In this case, the vehicle was readily operative and parked in a place used solely for transportation vehicles; it was not remotely possessing the characteristics of a residence. As such, the warrantless search of the petitioner's vehicle, accompanied by probable cause, was within the confines of the Fourth Amendment.

II.

THE IMPROPER CLOSING ARGUMENT BY THE PROSECUTOR WAS DETERMINED BY THE STATE TRIAL COURT TO HAVE BEEN HARMLESS IN LIGHT OF THE PETITIONER'S ARGUMENT IN SUMMATION.

The state trial court expressed the opinion that even if the objection by petitioner was sufficient to preserve the issue, a harsh curative instruction highly prejudicial to the state would have been sufficient to cure any error (R 848). However, defense counsel chose to make a rebuttal argument. The trial court found that this rebuttal argument offset the improper statements by the prosecutor (R 850). As such, the trial court made a harmless error determination in keeping with this Court's doctrine in Chapman v. California, 386 U.S. 18 (1967).

The Ninth Circuit Court of Appeals in Bruno v. Rushen, 721 F.2d 1193 at 1195 (9th Cir. 1983), a case relied on by petitioner to show conflict, applied the

Chapman harmless error standard to an erroneous prosecutorial argument. It is clear there is no conflict of decisions since the judgment in Bruno and the one now before this Court both use an analysis of harmless error. Respondent respectfully submits that the instant harmless error decision does not warrant certiorari review since this point turns on specific facts rather than a matter of law which is in need of this Court's clarification. See, Fry Roofing Co. v. Wood, 344 U.S. 157 (1952).

CONCLUSION

Whereas, the judgment of the Florida Second District Court of Appeal does not manifest conflict of opinions with any other Court and the questions presented are matters of law which are well established and decided contrary to the petitioner, the petition for writ of certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

IN THE
UNITED STATES SUPREME COURT
October Term 1988

Case No. 88-783

PETER DAVID VANDERCREEK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SECOND DISTRICT COURT OF APPEAL,
STATE OF FLORIDA

A P P E N D I X
OF RESPONDENT

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY CRIMINAL DIVISION

STATE OF FLORIDA CASE NO: 85-11699

vs. DIVISION: "D"

PETER D. VANDERCREEK

ORDER DENYING MOTION TO SUPPRESS

THIS CAUSE having come before the Court upon the Defendant's Motion to Suppress to warrantless search of the motor vehicle seized at the scene of the crime, said search having been conducted at approximately 9:00 o'clock a.m. while said vehicle was impounded, which said search revealed the alleged weapon used in this homicide, and the Court having considered the motion of the defendant, together with his memorandum in support of same, the answer to the Motion to Suppress and Memorandum of Law filed by the State, the reply Memorandum to the State's Answer to Motion to Suppress, the supplemental authority of U.S. v. Hamilton, 792 Fed. 2d

837 (U.S.C.A. 9th Circuit 1986), and the defense's response to the State's supplemental authority, as well as the testimony of the witnesses presented to the Court and the other evidence presented, and the Court being otherwise advised in the premises, it is

ORDERED AND ADJUDGED that the Motion to Suppress is denied as there existed probable cause to believe that the car was, or contained, evidence of a crime and that the seizure without a warrant and subsequent search is justifiable under the "automobile exception", based upon the authorities cited to the Court. The vehicle contained blood smears or splots from the crime which had just occurred and officers had observed both the defendant and victim in the car less than one hour prior to the established time of the homicide. Since the vehicle was in plain view and the blood on the vehicle in plain view after the officers came upon the

premises under exigent circumstances, the seizure and search of the vehicle was justifiable without a warrant and the fact that the officers considered obtaining a search warrant before conducting the search is of no relevance.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida this 30th day of July, 1986.

/s/
CIRCUIT JUDGE

Copies furnished to:

State Attorney
Richard Pippinger, Esquire, Attorney
for Defendant

RECORD EXCERPTS

THE COURT: Fine. Get on to the point. Are you making a Motion for Mistrial or not?

MR. PIPPINGER: Your Honor, I don't want a mistrial attributable to the Defense.

THE COURT: Are you making a Motion for a Mistrial?

MR. PIPPINGER: Yes, Your Honor, I am.

THE COURT: State the specific grounds.

MR. PIPPINGER: Grossly and totally improper final argument by the State of Florida in three to four areas that I have mentioned.

The fourth area being the going back after seeing the medical records, going back and again saying they didn't have access to them. That is two aspects. The same one making for grossly improper final argument. I ask that the mistrial be attributable to the State and not the Defense.

THE COURT: How can you do that?

MR. PIPPINGER: Because they have caused it intentionally in my judgment, prosecutorial misconduct.

THE COURT: You are now accusing the State of prosecutorial misconduct?

MR. PIPPINGER: Yes, I am. I think the record speaks for itself, Your Honor.

THE COURT: Why did you lay and wait? Why the second Mr. Castillo mentioned about the doctors not being called, wasn't there an objection made right at the very first time he mentioned it?

MR. PIPPINGER: Your Honor, I hesitate, I hesitate to interrupt final argument because that jury was twelve people, every time, you know, thinks you're trying to hide something from them.

THE COURT: Then why did you wait? You ultimately objected.

MR. PIPPINGER: I had no choice when we got to four times, Your Honor. What am I supposed to do, object?

Your Honor, I object that Mr. Castillo says I know something about the case which is -- I mean it's just asking this jury to believe that I believe that I have been struck and that they have hit a sensitive nerve.

THE COURT: Commenting on the failure to produce a witness may or may not be a valid objection but it should have been made the second such a comment was made and not allow your opponent to continue and then after he goes into another area and now he is about ready to sum up and sit down and then mentions it once more and up you jump and now you object.

MR. PIPPINGER: He mentioned an extension of it. First he said asking to draw a comment on it and then he suggested what my response would have been and I felt tactically sitting along at that point that I'm going to tell this jury he has subpoena power just as much as I do. I made a decision to handle it that way.

Then he comes back when I jump up and suggests to the jury that he couldn't have subpoenaed the witnesses because he didn't know they existed, he couldn't find out where they existed and that is when I jumped up.

THE COURT: My recollection is that Mr. Castillo says I anticipate what Mr. Pippinger or Mr. Gross will do.

MR. PIPPINGER: That's correct --

THE COURT: Don't interrupt me.

MR. PIPPINGER: Excuse me, Your Honor, I agree. I apologize.

THE COURT: Now, lawyers sometimes get carried away and instead of saying the evidence will show that self-defense is a manufactured defense, a lawyer may use, I suggest it's manufactured, they know it. I don't find deliberate prosecutorial misconduct.

I do find that hindsight batting a thousand, the State would have been well advised not to use such language or such suggestion.

Your Motion for a Mistrial is denied.

Defendant's Motion for Judgment of Acquittal or Renewed Motion for Judgment of Acquittal is denied. The only grounds that the Court even considered in its own mind as being close was when the objection was made to Mr. Castillo's argument to this jury concerning manufactured evidence, et cetera, et cetera. The record speaks for itself as to the exact words set forth in the memorandums, and I'm certainly not going to redictate them into the record.

And this Court's recollection is that I gave defense counsel an opportunity to draft a curative instruction to the effect that it was improper and, Mr. Pippinger, you're correct, I gave you an alternative if you felt that a curative instruction would highlight it even more so, and you chose to handle it on final rebuttal. That was your decision.

I can visualize a curative instruction to that jury, ladies and gentlemen of the jury, you are instructed that Mr. Cass Castillo, although he may not have intentionally done so, has made a highly improper and unethical argument when he told you p-r-r-r-r-r and so forth. I'm sorry, the court reporter cannot take that.

So I probably could have, in front of this jury, given such a cautionary instruction that I would have overcautioned them to the prejudice of the State, depending upon however I'm going to go in telling that jury that what he said was improper, not to be considered.

And I'm firmly convinced that the rebuttal argument made by counsel for the defendant to Mr. Castillo's final summation completely offset Mr. Castillo's improper statements, and that this jury was not swayed by Mr. Castillo's comments directed to the defense, and that this jury intelligently considered the evidence in this case in light of this Court's instructions.

And when you look at the elements of Second Degree Murder, there was competent, substantial evidence before that jury from which the jury could have returned such a verdict.

Defendant's Motion for New Trial and Renewed Motion for Judgment of Acquittal is denied.